Supreme Court of the United States

OCTOBER TERM, 1941.

No. 772

DEWEY BRILLHART, ADMINISTRATOR OF THE ESTATE OF JAMES DWIGHT BRILLHART, DECEASED, PETITIONER,

v.

THE EXCESS INSURANCE COMPANY OF AMERICA, a Corporation, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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THE EXCESS INSURANCE COMPANY OF AMERICA, a Corporation, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

The final order of the District Court (R. 39, 40) is unreported. The opinion of the Circuit Court of Appeals (R. 41-45) is reported in 121 F. (2d) 776. Petition for certiorari was filed November 27, 1941, and granted January 5, 1942. ——— U. S. ———, 86 L. ed. 362.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 23, 1941 (R. 45, 46). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

Petitioner only partially states the facts. Respondent, therefore, feels that a short, chronological statement of all the facts is necessary to a proper discussion and understanding of the issues.

Respondent is a New York insurance company, engaged in the business of reinsuring direct-writing insurers. In the year 1932 respondent entered into a contract with Central Mutual Insurance Company of Chicago, Illinois (a direct-writing insurance company), by the terms of which respondent agreed to repay any amount of ultimate net loss which Central might pay, over and above certain specified amounts, by reason of losses under public liability policies issued by Central during the life of the reinsuring agreement (R. 4, 5, 6).

This contract was signed by Central in Chicago, Illinois, and by respondent in New York City (R. 6).

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(1) The reinsuring clause of the contract provides: "Section I. The Reinsurer agrees to reinsure the Company (Central) as respects all third party automobile public liability policies, * * * and agrees to repay any amounts of ultimate net loss which the Company may pay in excess of the first Five Thousand Dollars ($5000) on account of any one person injured or killed and the first Ten Thousand Dollars ($10,000) on account of more than one person injured or killed in any one accident, * * *." "Section II. The term 'ultimate net loss' shall be understood to mean and shall mean the sum actually paid in cash in settlement of losses for which the Company is liable. * * *." (R. 5).

In January of 1934 Central issued a policy of public liability insurance to Cooper-Jarrett, Inc., a motor freight carrier operating out of Kansas City, Missouri (R. 6, 7). By this policy Central agreed to insure Cooper-Jarrett against loss from liability imposed by law for damages on account of bodily injury, including death, occasioned by the ownership, operation or maintenance of certain motor vehicles described in the policy (R. 7).

In October, 1934, petitioner's decedent was killed in an accident that occurred in the state of Ohio while he was operating a truck leased by Cooper-Jarrett (R. 7). Immediately after the accident petitioner filed a damage suit against Cooper-Jarrett in the Circuit Court of Jackson County, Missouri, at Independence (R. 7, 8). Central was tendered the defense of the suit, but refused to do so upon the ground that its policy did not cover the accident and the injury sustained (R. 8). Cooper-Jarrett then employed counsel who filed an answer traversing the allegations of the petition (R. 8).

On January 11, 1937, Central was found to be hopelessly insolvent and the Circuit Court of Cook County, Illinois, in a statutory liquidation proceeding, entered an order directing the liquidation of the company and appointing Henry G. Miller, Esq., permanent receiver of all Central's assets (R. 8). Within a few days the Illinois Court made an order restraining and enjoining all persons from bringing, prosecuting or maintaining any action against Central except in that Court (R. 8). By another order it directed all claimants to present their claims to that Court within a day stated or be forever barred (R. 8). Notices of the above order and proceedings were sent by the receiver to all known claimants and policyholders including petitioner (R. 8). Petitioner never filed any claim with the receiver, and

there is no longer any liability on the part of Central or its receiver (R. 8-9).

Subsequent to Central's receivership and on May 14, 1937, Cooper-Jarrett, Inc., filed in the Federal District Court for the Western District of Missouri its petition for reorganization under the provisions of Section 77B of the Federal Bankruptcy Act (R. 9). Petitioner filed his claim in that proceeding, but on April 1, 1939, the Bankruptcy Court, upon *ex parte* application, permitted petitioner to withdraw his claim and prosecute his action in the Missouri state court on the ground that Cooper-Jarrett had insurance (R. 9). On the same day the final decree in the 77B proceeding was entered and it, *inter alia*, fully and finally discharged Cooper-Jarrett from any claim or judgment that had been obtained or might be obtained by petitioner (R. 9).

On April 22, 1939, a default judgment for $20,000 was entered by the Circuit Court of Jackson County, Missouri, against Cooper-Jarrett and in favor of petitioner (R. 7-8). Almost two years before (September 30, 1937) the attorneys employed by Cooper-Jarrett had withdrawn and thereafter and at the time the default judgment was rendered Cooper-Jarrett was without counsel and no defense was offered (R. 9).

Following the default judgment, petitioner attempted to serve (contrary to the existing orders of the Circuit Court of Cook County, Illinois) summons in garnishment upon Central by delivering copies thereof to the superintendent of insurance for the state of Missouri (R. 9). *After* the present suit was filed, and on June 28, 1940, final judgment for $22,100 (more than twice the limit of the policy), was entered by default against Central in the garnishment proceeding (R. 36).

April 10, 1940, respondent filed its bill of complaint for declaratory and equitable relief in the United States

District Court for the District of Kansas (R. 3). Original Federal jurisdiction affirmatively appeared, the complaint alleging diversity of citizenship and that the amount in controversy exceeded, exclusive of interest and costs, the sum of $3,000 (R. 4, 5). At that time respondent was not and never had been a party to any of the proceedings in the Missouri state court. Moreover, respondent had never been notified by Central either of the Ohio accident or of the claim and suit filed by petitioner against Cooper-Jarrett (R. 12). This Central was obligated to do by the terms of the contract of reinsurance between it and respondent.[1] Central had also failed to notify respondent of the issuance of its policy to Cooper-Jarrett, Inc., and had never filed a specimen copy thereof with respondent as it was required to do by Section V of the contract.[2] The first knowledge respondent ever had of petitioner's suit against Cooper-Jarreft was on February 9, 1939, when it received a letter from Frank T. Barker, Esq., the attorney for Cooper-Jarrett in the reorganization proceeding (R. 12).

After respondent filed this action for declaratory relief, and on May 29, 1940, the petitioner had summons in garnishment against respondent served on the superintendent of insurance for the state of Missouri (R. 31, 36). This was the first time that any action was taken against respondent, although it had previously been threatened with suit (R. 10, 13).

June 27, 1940, petitioner filed his motion to dismiss and answer (R. 3). On July 1, 1940, the motion was

(1) Sec. IX: "The Company shall notify the Reinsurer immediately after it has had notice of any accident in which this reinsurance is or may probably be involved. * * *." (R. 6).

(2) Sec. V provides: "The Company shall file with the Reinsurer a specimen copy of each policy form issued by the Company and reinsured hereunder and the Company shall furnish amendments thereto as and when changes are made." (R. 6).

argued to the Court, at the conclusion of which the Court indicated it would dismiss the complaint. The Court said (R. 39):

> "The Court: As I understand, the merits of the case with reference to the death of this decedent have never been tried.
>
> "Mr. Woods: That is correct, and it is almost six years now.
>
> "The Court: Well, I don't think this Court will interfere with that. This case will be dismissed.
>
> "You may draw a journal showing that after this long lapse of time, after your litigation in Missouri, that this Court feels in its discretion that it ought not to interfere with that litigation in any way."

The order of dismissal reads (R. 39):

> " . . . the Court having duly considered said bill of complaint and said motion to dismiss having heard and considered the statements of fact and arguments of counsel, and the length of time which has transpired since the inception of the Missouri suit referred to in plaintiff's complaint, and being fully advised in the premises, finds that in the exercise of the Court's sound discretion defendant's motion to dismiss plaintiff's bill should be sustained, and the case be not heard upon the merits by this Court."

Neither Cooper-Jarrett nor Central has ever paid out anything upon the claim of petitioner and both Cooper-Jarrett and Central have been discharged from all liability by the orders of the Federal District Court for the Western District of Missouri and the Circuit Court of Cook County, Illinois. Neither Cooper-Jarrett nor Central defended the suit brought by petitioner and the judgments upon which petitioner is proceeding

against respondent in the Missouri state court have been default judgments entered without any trial on the merits.

QUESTIONS PRESENTED.

1. Did the District Court have a discretion to decline to pass on respondent's prayer for a declaratory judgment? If it did, was its discretion properly exercised, or exceeded?

2. Did the District Court have any discretion to dismiss that part of respondent's complaint which invoked the independent, equitable jurisdiction of that Court?

ARGUMENT.

I.

A present, actual, justiciable controversy was stated.

The Federal Declaratory Judgment Act (Sec. 274d, Judicial Code; 28 U. S. C. A. §400) confers jurisdiction upon the Federal Courts to grant declaratory relief where (1) the requisite diversity of citizenship exists and the statutory amount is involved, and (2) a justiciable, as distinguished from an academic, moot or advisory, question is presented. Where the controversy is real and a "case and controversy" is made within the meaning of the Constitution and an "actual controversy" appears within the meaning of the Act, the power and jurisdiction to grant declaratory relief are clear. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 81 L. ed. 617, 108 A. L. R. 1000 (1937); *Columbian Natl. Life Ins. Co.* v. *Foulke*, 89 F. (2d) 261 (C. C. A. 8, 1937); *U. S. F. & G. Co.* v. *Pierson*, 97 F. (2d) 560 (C. C. A. 8, 1938); *Associated Indemnity Corp.* v. *Manning*, 92 F. (2d) 168 (C. C. A. 9, 1937).

In this case respondent is seeking to have its liability or non-liability under the contract with Central determined. Before the commencement of this suit petitioner was maintaining and now maintains that respondent is liable to him because of the Central-Excess contract. Respondent, on the other hand, has at all times denied liability.[1] This situation and the antagonistic positions of the parties clearly presented an actual controversy within the definition of the *Haworth* case, and the subsequent cases so holding are legion. Petitioner admits the existence of such a controversy. (¶12 (b) R. 10-11; admitted R. 19).

II.

A proper case for declaratory relief was stated in the complaint.

It is freely conceded that trial courts have a discretion to refuse declaratory relief under certain circumstances. But that discretion is limited. The only cases where it has been upheld are where there was already pending in another court a suit between the same parties, involving the same or substantially the same issues, and where there was no doubt but that plaintiff could obtain as full, adequate and complete relief in the pending state court action. *Western Supply Co.* v. *Freeman*, 109 F. (2d) 693 (C. C. A. 6, 1940). To this it may be added that the discretion exists also where the declaratory suit merely seeks to anticipate a defense which is or may be raised in the pending action. *Aetna Cas. & Surety Co.*

1. The Central-Excess contract has many times been construed to be one of indemnity against loss, with no obligation on Excess to do more than reimburse the primary insurer for actual payments made. *Stickel* v. *Excess Ins. Co. of America*, 136 O. St. 49, 23 N. E. (2d) 839 (1939); *Fisher* v. *Excess Ins. Co.*, 115 F. (2d) 755 (C. C. A. 8, 1940); *Excess Ins. Co. of America* v. *Josh Owen*, (D. C. Okla., Oct. 16, 1939 [not officially reported]). *Cf. Fid. & Dep. Co.* v. *Pink*, 302 U. S. 324, 82 L. ed. 213 (1938). Petitioner doubtless relies on *Homan* v. *Employers Reins. Corp.*, 345 Mo. 650, 136 S. W. (2d) 289 (1939), but the court there was careful to distinguish the contract there involved from that in the instant case. See 345 Mo. 650, l. c. 670, 671, 136 S. W. (2d) 289, 302.

v. *Quarles*, 92 F. (2d) 321 (C. C. A. 4, 1937); Borchard, *Declaratory Judgments* (2 Ed. 1941), p. 653.

But under all the authorities, if there is no pending suit between the same parties, or if there is, and it is not entirely clear that the relief which can be obtained in the other suit is fully adequate and complete, the trial court exceeds its discretion in declining to entertain the suit. *Associated Indemnity Corporation* v. *Garrow Co.*, 125 Fed. (2d) 462, (C. C. A. 2, 1942);[1] *Ohio Casualty Co.* v. *Gordon*, 95 F. (2d) 605 (C. C. A. 10, 1938); *Western Cas. & Surety Co.* v. *Beverforden*, 93 F. (2d) 166 (C. C. A. 8, 1937); *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 F. (2d) 514 (C. C. A. 3, 1938); *United States Fid. & G. Co.* v. *Koch*, 102 F. (2d) 288 (C. C. A. 3, 1939); *Aetna Life Ins. Co.* v. *Martin*, 108 F. (2d) 824 (C. C. A. 8, 1940); *Aetna Cas. & Surety Co.* v. *Yeatts*, 99 F. (2d) 665 (C. C. A. 4, 1938); *Employers' Liability Assur. Corp., Ltd.* v. *Ryan*, 109 F. (2d) 690 (C. C. A. 6, 1940), *cert. granted*, 310 U. S. 621, 84 L. ed. 1394, *dismissed*, 311 U. S. 722, 85 L. ed. 470; *Lehigh Coal & Navigation Co.* v. *Central Railway of N. J.*, 33 F. Supp. 362 (D. C. Pa., 1940); and Borchard, *Declaratory Judgments* (2d Ed., 1941), pp. 313, 314, 654, 659; *Standard Acc. Ins. Co.* v. *Meadows*, 125 Fed. (2d) 422, (C. C. A. 5, 1942).

The existence of another adequate remedy is no reason for a Court to refuse to grant relief by way of a declaration of rights. Borchard, *Declaratory Judgments* (2d Ed., 1941), p. 313; Rule 57, Rules of Civil Procedure (28 U. S. C. A. following § 723c). In the *Lehigh Coal* case (*supra*) Kalodner, J., said (p. 366):

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1. In a per curiam opinion, the Second Circuit, citing with approval the opinion below, in the instant case, said:

"It would have been an abuse of discretion not to decide it in the declaratory judgment suit. *Excess Ins. Co. of America* v. *Brillhart*, 10 Cir., 121 F. (2d) 776."

"As was stated in *Employers' Liability Assur. Corp., Limited* v. *Ryan, et al., supra, Rule* 57 has crystallized the prevailing view that the Declaratory Judgment Act furnishes an additional remedy which is not to be denied the plaintiff because of the pendency of another suit."

Where the state court action will not determine all the issues included in the declaratory judgment suit, it has been held that the pendency of such an action in a state court will not justify a denial of declaratory relief. In *Maryland Casualty Co.* v. *United Corp.*, 111 F. (2d) 443 (C. C. A. 1, 1940), the Circuit Court of Appeals reversed the District Court's dismissal of a bill for a declaratory judgment where there was a pending state action because:

"* * * in the case at bar the pending suit in the state court will determine only the liability of the Assured for negligence; it will not determine whether the insurer had any obligation to defend or whether the insurer is obligated to indemnify the Assured. Under such circumstances it has been held, we think rightly, that the application of an insurer for a declaratory judgment cannot be denied as a matter of discretion. *Maryland Casualty Co.* v. *Consumers Finance Service, Inc.*, 3 Cir., 101 F. (2d) 514, 515, 516."

Moreover, it has been held that declaratory relief may not be denied upon the grounds that some other action in the future may dispose of the issues involved in the declaratory judgment suit. *Aetna Life Ins. Co.* v. *Martin*, 108 F. (2d) 824, 828 (C. C. A. 8, 1940). See also *Columbian Nat. Life Ins. Co.* v. *Foulke*, 89 F. (2d) 261 (C. C. A. 8, 1937); *Western Casualty & Surety Co.* v. *Beverforden*, 93 F. (2d) 166 (C. C. A. 8, 1937); *New York Life Ins. Co.* v. *Roe*, 102 F. (2d) 28 (C. C. A. 8, 1939); *Carpenter* v. *Edmonson*, 92 F. (2d) 895 (C. C. A.

5, 1937); Borchard, *Declaratory Judgments* (2d Ed., 1941) p. 653.

This Court, in *Maryland Casualty Co.* v. *Pacific Oil & Coal Co.*, 312 U. S. 270, 85 L. ed. 826 (1941), has decided, by inevitable implication, that the pendency of a state court action against another and the possibility that the judgment therein will be followed by supplemental process in the nature of garnishment against one requesting a declaratory judgment does not warrant the dismissal of the declaratory judgment action.[1]

Moreover, this case and *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, both hold that where a justiciable controversy is pleaded and the requisite diversity of citizenship and jurisdictional amount are present, that the plaintiff in a declaratory judgment suit is entitled to the relief prayed if the pleaded facts are proved. And in so deciding, both cases necessarily assume that the Federal Courts ordinarily have no discretion to decline jurisdiction. From which it should follow, that in declaratory judgment suits, as in all others where Federal jurisdiction exists, the court must exercise its powers unless other facts are shown which would relax the imperative duty into a discretion to decline. The circumstances which may give rise to such a discretion have already been shown. But the instant case is not among them.

Here there was no pending suit between the parties. If there had been, the issues would not have been the same, and the remedies and relief here sought could never have been accorded in the garnishment proceeding in the state court.

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1. It is interesting to note, petitioner's contention to the contrary notwithstanding, that the proceeding in Ohio, as in Missouri is a supplementary process and not an independent action. Page's Ohio General Code, Sec. 9510-3, 9510-4. *Cf.* Rev. Stat. Mo. 1939, Secs. 6009, 6010. (See Appendix).

Petitioner's oft-repeated assertion and assumption of the existence of a pending state court action between the same parties is the very reverse of the fact. This suit, not the state court proceeding, was the first brought, and petitioner is really pressing upon the court the proposition that the Federal Court should give way to the later garnishment proceeding in the state court. The Federal suit between these parties was filed April 10, 1940. The garnishment proceeding by petitioner against respondent was instituted May 29, 1940. And if there is any reason why one of them should end, it should be the garnishment proceeding and not this suit. In truth, since both proceedings are transitory in character, both may pend at the same time under ordinary usage and custom of the courts. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 67 L. ed. 227 (1922). Nor will the fact be overlooked that the pendency or prosecution of this suit will not interfere with the garnishment proceeding in the state court.

The mere fact that petitioner, at the time respondent filed its bill, may have intended or even threatened to institute garnishment proceedings against respondent cannot defeat respondent's right to a declaration. So to hold would nullify the purpose of the Act which is to give a potention litigant the right to have his liability determined without having to await coercive action by his adversary. The effect of such a holding would be to deny to an insurance company in the position of respondent here the right to a declaratory judgment in every case where an injured person institutes suit against an insured. Once such a suit is filed, the insurance company would be precluded from asking for declaratory relief, because the suit might possibly eventuate in action against the insurance company by way of garnishment or similar proceeding. Obviously, Congress did not intend so to limit the remedy.

III.

Respondent's relief in a Missouri garnishment proceeding is not as full, adequate, and complete as that obtainable in the declaratory judgment action.

It is true that in Missouri a garnishment proceeding on execution is a mere continuation of the old, and not the institution of a new suit. But except as applied to the parties themselves, this is the statement of a mere legal fiction. When a garnishee is brought in by the service of a summons he becomes a party to that suit for the first time. By no stretch of the imagination can it be said that there is a suit pending against him before he is actually served with process. And as between the judgment creditor and the garnishee, no matter by what name it is called, the proceeding is a new suit, a new action. It is begun by the issuance and service of a summons. The issues are then framed by pleadings filed by the garnishee and the judgment creditor. The issues thus formed are tried by the Court and by a jury if necessary. The trial results in a final judgment, either in favor of or against the garnishee, and that judgment is enforced by execution in the same manner as is the judgment against the defendant in the original suit. In other words, garnishment in Missouri possesses all the attributes of a conventional suit at law. It is idle to say that the issues between plaintiff and defendant in the lawsuit are the same as those between a judgment creditor and a garnishee.

Respondent here was brought into the state court proceeding after its complaint for declaratory relief was filed (R. 3, 31, 36, 37). And so there was no suit pending against the respondent on April 10, 1940.

Commencing with the premise that garnishment in Missouri is a supplemental process in aid of execution,

petitioner reaches the amazing conclusion that since there was an unsatisfied judgment against Cooper-Jarrett and a garnishment proceeding upon that judgment against Central, a suit involving the same issues as those in respondent's declaratory judgment action was pending against respondent at the time it filed its complaint in the District Court. Petitioner reaches this anomalous result despite the undisputed fact that at that time no proceeding or process had been instituted or issued against respondent.

Petitioner's argument creates a distinction out of an immaterial difference. Whether the Missouri garnishment statute gives petitioner a supplemental remedy which is a continuation of the original suit against Cooper-Jarrett or whether it is a separate and independent action is a bootless distinction.

If the garnishment proceeding had pended, the issues would not have been the same as those here. The relief, if any, which Excess could get in the garnishment proceeding would be wholly inadequate. In Missouri a garnishment proceeding is purely legal. The only defense available in such a proceeding would be that it did not owe the primary insurer, Central, or Cooper-Jarrett, the assured. Neither the judgment against Cooper-Jarrett nor against Central could be challenged upon any ground except that it was *coram non judice* and void, and then only if the defect appeared on the face of the record. The law of Missouri is settled on this point.

In *Potter* v. *Whitten*, 161 Mo. App. 118, 142 S. W. 453 (1912), which was a garnishment proceeding, the Court said (131-2):

" • • • It was early held that objections to a judgment rendered against defendant, which

do not go to the jurisdiction of the Court, and concern defendant alone, cannot be successfully raised by a garnishee for defendant's indebtedness. [*The St. Louis Perpetual Ins. Co.* v. *Cohen*, 9 Mo. 421.]"

And in *Nevatt* v. *Springfield Normal School*, 79 Mo. App. 198 (1899), the garnishee urged that the proceedings as to him should be dismissed because the judgment against the original defendant had been rendered without service of process. The judgment itself, however, stated that process had been served. The Court refused to dismiss the proceeding, saying, p. 201:

"It is conceded in the abstract of the record that the foregoing judgment correctly states the service of process upon which it was rendered; hence the whole question for decision is whether or not the recitals of the judgment show the Court had no jurisdiction of the person of the defendant? For unless that appears from the face of the judgment its validity cannot be questioned when sought to be enforced by garnishment, without subjecting it to collateral attack, and this the law does not permit. *Godman* v. *Gordon*, 61 Mo. App. 685; *Wise* v. *Loring*, 54 Mo. App. 258; *Truesdail* v. *McCormick*, 126 Mo., loc. cit. 45. If the judgment under which the garnishee is summoned is void, he is entitled to a discharge. If it is merely voidable, he is not for that reason entitled to a discharge. *Hopkins* v. *Huss*, 67 Mo. App. 394, 61 Mo. App. *supra*. This is so because he occupies the status of a stranger to the judgment against his creditor, and hence can only urge against it the objections available on collateral attack."

So also, in *Reid, Murdock & Co.* v. *Mercurio*, 91 Mo. App. 673 (St. Louis St. of App., 1902), the Court said (p. 678):

"Appellant (garnishee) can not be heard to say the judgment of the justice of the peace in the original action is void on the ground that the ac-

count filed by the plaintiff was insufficient. Jurisdiction was obtained over one of the Mercurios, as the return of the constable shows; and if the defendant who was served did not contest the sufficiency of the account or statement, certainly the judgment can not be attacked on account of its indefiniteness, in this collateral proceeding by a third party. *Myers* v. *McRay*, 114 Mo. 377."

In the case at bar the record of the Missouri state court shows no lack of jurisdiction as to either Cooper-Jarrett, Inc., or Central. Respondent, consequently, would be precluded by the rule announced in the *Nevatt*, *Reid-Murdock* and *Potter* cases from raising that defense. This alone, shows the inadequacy of the relief afforded plaintiff in the Missouri action, and unequivocably establishes its right to declaratory relief.

IV.

The trial court had no discretion to dismiss the entire complaint since it included prayers for both declaratory and equitable relief.

Respondent's complaint seeks more than a declaration. If by its contract with Central it is beholden to Brillhart, then respondent invokes the independent equitable jurisdiction of the court to restrain Brillhart from enforcing (as to respondent) his judgments against Cooper-Jarrett and Central. The joinder of this prayer for "further relief" is authorized by the Act. Judicial Code, § 274d; 28 U. S. C. A. § 400. Moreover, with or without this authorization, since Federal jurisdiction over this part of the controversy is concededly present, the trial court had no discretion to decline (as it did, R. 39) to hear that part. It was bound to proceed to judgment. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234, 67 L. ed. 227 (1922); *Smith* v. *Apple*, 264 U. S. 274, 280, 68 L. ed. 678 (1924); *Kansas* v. *Colorado*, 185 U. S. 125, 145, 46

L. ed. 838 (1902); *New York Life Ins. Co.* v. *London*, 15 F. Supp. 586, 590, (D. Ct. Mass. 1936).

If the proposition above premised is sound, then, discretion *vel non* as to the declaration, the trial court erred in dismissing the complaint. And from this it must also follow that if the court had no right to dismiss the entire complaint, it certainly would abuse its discretion if it passed upon the coercive part of the suit and left the rest of it hanging in the air. This for two formidable reasons: (1) the prayer for injunctive relief cannot be passed on until the prayer for a declaration is determined, and (2) courts of equity always deal out full and complete justice and not by halves.

The pleaded facts carry a powerful equitable appeal. [Paragraphs 13-17, inc., R. 11-14]. In these paragraphs it is charged (1) that the judgments against both Cooper-Jarrett, Inc., and Central were entered after each had been released from all liability to petitioner; (2) that neither the suit against Cooper-Jarrett, Inc., nor the garnishment proceeding against Central had defenders of was defended; (3) that respondent was a party to neither of these proceedings and was never accorded an opportunity to defend; and that to bind it by either judgment would be to deprive respondent of its rights without the due process of law guaranteed by Article XIV, Section 1, of the Amendments to the Federal Constitution; (4) that the entry of the default judgment against Central was also a denial of the full faith and credit accorded by Article IV, Section 1, of the Federal Constitution, to the orders, judgments and proceedings of the Circuit Court of Cook County, Illinois; (5) that under the real facts Cooper-Jarrett was not liable to Brillhart; that even if liability existed, the amount of the recovery was far in excess of the actual loss or damage sustained; (6) that Brillhart's

decedent was an employee of Cooper-Jarrett at the time, and his remedy limited to that accorded by the Workmen's Compensation Law of Ohio or Missouri, and that the accidental death was not within the coverage of Central's primary policy; and (7) finally, it appears that Brillhart's default judgment against Central, entered years after it was legally dissolved and dead, and entered also after this suit was filed (R. 36), was for $22,000, which was $12,000 in excess of Central's policy limit (R. 7, 36). Respondent's reinsurance with Central began at $5,000 and stopped at $145,000 (R. 5).

While § 265 of the Judicial Code prevents a Federal court of equity from enjoining proceedings in pending state court suits, nevertheless, when the litigation has ended and a final judgment has been obtained, the judgment creditor may and will be debarred from enforcing his judgment if it was obtained by fraud, without due process of law or under circumstances which would render its enforcement inequitable, unconscionable or unjust. *Wells-Fargo & Co.* v. *Taylor*, 254 U. S. 175, 65 L. ed. 205 (1920); *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 59 L. ed. 492 (1915); *Marshall* v. *Holmes*, 141 U. S. 597, 35 L.ed. 870 (1891); *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524 (1876); *Barrow* v. *Hunton*, 99 U. S. 80, 25 L. ed. 407 (1879); *Arrowsmith* v. *Gleason*, 129 U. S. 86, 32 L. ed. 630 (1889); *Johnson* v. *Waters*, 111 U. S. 640, 28 L. ed. 547 (1884).

In such action the court does not assail the judgment itself. But it lays hold of the successful party and deprives him of any inequitable advantage which he may derive from it. And the suit invokes the purely equitable power and jurisdiction of the court, is deemed to be a direct, not a collateral attack, and an original independent proceeding, a new case, arising upon new facts. [Authorities, last paragraph, supra].

Such a suit may always be maintained in a Federal equity court if by custom, law or statutory provision such a suit can be maintained in the local state court. *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524 (1876); *Barrow* v. *Hunton*, 99 U. S. 80, 25 L. ed. 407 (1879); *O'Brien* v. *Markham*, 17 F. Supp. 633, 637, (D. Ct. Cal. 1936). That Missouri courts of equity would entertain such a suit and grant the relief herein sought is settled law in that state. In *Overton* v. *Overton*, 327 Mo. 530, 37 S. W. (2d) 565 (1931), where such relief was granted, the court said (540):

> "It is settled doctrine that courts of equity have jurisdiction to grant relief against the enforcement of judgments at law where such judgments were obtained or entered through fraud, accident or mistake."

Observing that equity will not grant relief for the purpose of giving a defeated party a second opportunity to be heard, the court nevertheless said:

> "'But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issues in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; *or where the defendant never had knowledge of the suit,* * * *—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.*' [*United States* v. *Throckmorton*, 98 U. S. 61, 65]." (Our emphasis).

See also *Howard* v. *Scott*, 225 Mo. 685, 125 S. W. 1158 (1910); *Wonderly* v. *The LaFayette Co.*, 150 Mo. 635, 51 S. W. 745 (1899).

The plight in which respondent found itself in the spring of 1940 made imperative the institution in some equity court of a combined action seeking declaratory and equitable relief. If it contented itself with defending Brillhart's threatened garnishment proceeding against it, it would face the dire hazard of being unable to raise the many questions addressed to the equity side of this Court. For in the garnishment proceeding the judgments against Cooper-Jarrett and Central would probably be res adjudicata. In addition, the Missouri garnishment proceeding is purely legal, and the only question which the court can determine is whether the garnishee owes the judgment defendant. If Brillhart had lived in Missouri, where these judgments were obtained, an independent suit in equity would lie under Missouri law in the Missouri court. And if *Gaines* v. *Fuentes*, *Marshall* v. *Holmes*, *Wells-Fargo & Co.* v. *Taylor*, *Johnson* v. *Waters*, *Barrow* v. *Hunton*, *Arrowsmith* v. *Gleason* are still a part of the law of the land and have not been overruled by *Toucey* v. *New York Life*, 62 S. Ct. 139, 86 L. ed. 107 (1941) (not officially reported) (and they have not: 86 L. ed. l. c. 113), then the trial court in the instant case has the same jurisdiction and power as that possessed by Missouri courts of equity to rescue the respondent from that plight.

It is not without significance that Brillhart nowhere in his petition or briefs refers to the equitable features of this lawsuit.

If it appears from the foregoing that the District Court had no power to abjure its jurisdiction over the equitable part of this action, then it must be that it had no discretion to cast out and decline to consider

the prayer for a declaratory judgment. The equitable relief was inextricably bound up with the other and entirely contingent and dependent upon a prior adjudication of the other.

Conclusion.

There could be no more fitting end to this brief than the language in the unanimous conclusion of the learned Circuit Court of Appeals:

> "At the time appellant filed its action for a declaratory judgment, no action was pending in any court in which it was a party. No proceeding had been instituted in which its liability as a reinsurer of Central's risks was an issue. The only proceeding pending in any court was the garnishment action instituted by appellees in the District Court of Jackson County, Missouri, against Central; appellant was not a party to that cause. The liability of Central, if any, arose under the contract executed by it with Cooper-Jarrett, while the liability of appellant to appellees, if any, arose under a separate agreement between it and Central. The issues in the garnishment action could not determine the liability of appellant under its reinsurance contract.
>
> * * *
>
> "The situation in which appellant found itself was squarely within the purview of the act. It was faced with a possible claim of liability on its policy of reinsurance. In fact, appellees now claim that appellant is liable to them. No claims had been asserted against it; no suit had been filed in any court seeking to hold it liable; but the contingent liability was there. It was not compelled to await the time and pleasure of appellees in instituting their action. It had a clear right to go into a federal court of competent jurisdiction, which had jurisdiction over appellees, and ask that they be compelled to come in and assert their claims.

"The trial court exceeded its discretionary powers in dismissing appellant's bill of complaint."

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX.

Revised Statutes, Missouri, 1939.

SEC. 6009. CANCELLATION OR ANNULMENT —WHEN VOID.—In respect to every contract of insurance made between an insurance company, person, firm or association, whether a stock, a mutual, a reciprocal or other company, association or organization, and any person, firm or corporation, by which such person, firm or corporation is insured against loss or damage on account of the bodily injury or death or damage to property by accident of any person, for which loss or damage such person, firm or corporation is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company, if liability there be, shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, or if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation or any part is due or unpaid; occasioned by said casualty. No such contract of insurance shall be canceled or annulled by any agreement between the insurance company and the assured after the said assured has become responsible for such loss or damage, and any such cancellation or annulment shall be void. (R. S. 1929, § 5898).

SEC. 6010. JUDGMENT CREDITOR MAY COLLECT INSURANCE, WHEN.—Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or

death or damage to property if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company, person, firm or association as described in the preceding section, and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment. (R. S. 1929, § 5899).

Page's Ohio General Code.

SEC. 9510-3. LIABILITY OF INSURANCE COMPANY FOR BODILY INJURY OR DEATH. § 1. In respect to every contract of insurance made between an insurance company and any person, firm or corporation by which such person, firm or corporation is insured against loss or damage on account of the bodily injury or death by accident of any person for which loss or damage such person, firm or corporation is responsible, whenever a loss or damage occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage or death occasioned by such casualty.

CANCELLATION OR ANNULMENT VOID. No such contract of insurance shall be cancelled or annulled by any agreement between the insurance company and the assured, after the said assured has become responsi-

ble for such loss or damage or death, and any such cancellation or annulment shall be void.

Page's Ohio General Code, 1935 Supplement.

SEC. 9510-4. INSURANCE MONEY APPLIED

Upon the recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, for loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage on account of loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage to a person on account of bodily injury to his wife, minor child or children if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or his successor in interest shall be entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor or his successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file in the action in which said judgment was rendered, a supplemental petition wherein the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action at law.

SUPREME COURT OF THE UNITED STATES.

No. 772.—October Term, 1941.

Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, Deceased, Petitioner,
vs.
The Excess Insurance Company of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[June 1, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The Excess Insurance Company of America, the respondent here, brought this suit for a declaratory judgment to determine its rights under a reinsurance agreement made in 1932 with the Central Mutual Insurance Company of Chicago, Illinois. By that contract the respondent agreed to reimburse Central, within specified limits, for any "ultimate net loss" (defined as "the sum actually paid in cash in settlement of losses") sustained by Central under automobile public liability policies thereafter to be issued. Central undertook to notify the respondent of any accident that might be covered by the reinsurance agreement. In 1934 Central issued a public liability policy to Cooper-Jarrett, Inc. Later in that year the petitioner's decedent was killed by a truck leased by Cooper-Jarrett, Inc., and suit was brought against the latter in a Missouri state court. Central refused to defend the suit, however, claiming that the policy did not cover the accident.

While the suit was pending both Central and Cooper-Jarrett, Inc., encountered financial difficulties. By order of an Illinois state court Central was liquidated and all claims against it barred. Cooper-Jarrett, Inc., filed a petition for reorganization under § 77B in the Missouri federal district court, and the final decree in that proceeding discharged it from any judgment that had been or might be obtained by the petitioner. Cooper-Jarrett, Inc., having abandoned defense of the suit, the petitioner obtained a default judgment of $20,000 against it on April 22, 1939, and subsequently instituted garnishment proceedings against Central in a Missouri state court. Being unable to recover any part of the judgment

from either Cooper-Jarrett, Inc., or Central, the petitioner on May 29, 1940, made the respondent a party to the garnishment proceeding through service on the Missouri superintendent of insurance.

But in the meantime the respondent filed this suit for a declaratory judgment in the federal District Court for Kansas. Its bill showed diversity of the parties' citizenship and the requisite jurisdictional amount. It alleged, *inter alia*, that when the bill in the federal suit was filed, the respondent was not a party to the garnishment proceeding in the state court; that, in violation of the terms of the reinsurance agreement, Central had never notified the respondent either of the accident resulting in the death of the petitioner's decedent or of the suit brought against Cooper-Jarrett, Inc.; that the respondent's only obligation under the reinsurance agreement was to indemnify Central against loss for sums actually paid in cash in settlement of losses for which Central was liable and since Central had never satisfied the claim against Cooper-Jarrett, Inc., the respondent could not be obligated in any way under the reinsurance agreement; that Cooper-Jarrett, Inc., was not liable to the petitioner for the death of his decedent; that even if it were, Central was obligated to defend the suit, and its failure to do so discharged the respondent of any liability under the reinsurance agreement; that even if it were originally liable, the discharge of Central and Cooper-Jarrett, Inc., had the effect of releasing the respondent; and that in any event the default judgment against Cooper-Jarrett, Inc., had been fraudulently obtained.

The petitioner moved to dismiss the suit, principally on the ground that the issues involved in the suit could now be decided in the garnishment proceeding pending in the Missouri state court. The District Court dismissed the bill, apparently because of a reluctance to prolong the litigation,[1] without considering whether the claims asserted by the respondent could under Missouri law be raised in the pending garnishment proceeding. The Circuit Court of

[1] It is difficult to ascertain from the record the precise grounds for the District Court's action. Some light is shed by the following colloquy which occurred at the conclusion of the argument upon the motion to dismiss the bill:

"The Court: As I understand, the merits of the case with reference to the death of this decedent have never been tried.

"Mr. Woods [counsel for the respondent]: That is correct, and it is almost six years now.

"The Court: Well, I don't think that this court will interfere with that. The case will be dismissed. You may draw a journal showing that after this long lapse of time, after your litigation in Missouri, that this court feels in its discretion that it ought not to interfere with that litigation in any way."

Appeals held that dismissal of the suit was an abuse of discretion, but instead of remitting the cause for a proper exercise of the District Court's discretion, reversed the judgment with directions that the District Court proceed to a determination on the merits. 121 F. 2d 776. In view of the important question affecting the interrelationship of the state and federal courts in the administration of the Federal Declaratory Judgments Act, 28 U. S. C. § 400, we brought the case here. 314 U. S. 606.

Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction. The petitioner's motion to dismiss the bill was addressed to the discretion of the court. *Aetna Casualty Co.* v. *Quarles*, 92 F. 2d 321; *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 F. 2d 514; *American Automobile Ins. Co.* v. *Freundt*, 103 F. 2d 613; see Note, 51 Yale L. J. 511. Compare *Canada Malting Co.* v. *Paterson Co.*, 285 U. S. 413, 422-23; *Douglas* v. *New Haven R. Co.*, 279 U. S. 377. The motion rested upon the claim that since another proceeding was pending in a state court in which all the matters in controversy between the parties could be fully adjudicated, a declaratory judgment in the federal court was unwarranted. The correctness of this claim was certainly relevant in determining whether the District Court should assume jurisdiction and proceed to determine the rights of the parties. Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.

Where a district court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.

We do not now attempt a comprehensive enumeration of what in other cases may be revealed as relevant factors governing the exercise of a district court's discretion. It is enough that it appears from the record before us that the District Court did not consider whether, under applicable local law, the claims sought to be adjudicated by the respondent in this suit for a declaratory judgment had either been foreclosed by Missouri law or could adequately be tested in the garnishment proceeding pending in the Missouri state court. This was a matter for determination, certainly in the first instance, by the District Court. Nor did the Circuit Court of Appeals, in reversing the judgment of the District Court, purport to find that under controlling Missouri law the issues set up by the respondent in this suit could not be contested in the pending Missouri proceeding.[2]

Whether and under what circumstances a reinsurer can be reached through a judgment against the insured are questions of local law. Whether the judgment against Cooper-Jarrett, Inc., could serve as a basis for garnishment proceedings against the respondent was therefore a matter of Missouri law. But that issue was never tendered before the Kansas district court; that court did not profess to pass upon it, and the Circuit Court of Appeals, in reversing the decree of dismissal, shed no light upon it.

If the lower courts had found that under Missouri law the respondent's claims could not adequately be tested in the pending garnishment proceeding, or that Missouri law on the subject was doubtful, and upon the basis of such a finding had taken jurisdiction of this suit for a declaratory judgment, we would not disturb such a finding. But no such finding can be extracted from this record. And it is not for us to attempt to pronounce independently upon Missouri law. To do so would be to disregard the limitations

[2] The opinion of the Circuit Court of Appeals contains a single sentence which, if read without reference to its context, might appear to be such a finding: "The issues in the garnishment action could not determine the liability of appellant [the respondent here] under its reinsurance contract." 121 F. 2d at 778. But, as we read its opinion, the court below clearly was referring only to the garnishment action against Central *before* the respondent was joined as a party. Of course, at that time the respondent would have no opportunity to raise in the garnishment proceeding the claims which it asserted in the federal suit for a declaratory judgment. But when the petitioner's motion to dismiss the federal suit was filed, the respondent had been made a party to the garnishment proceeding. And, as its opinion shows, the Circuit Court of Appeals did not find that under Missouri law the claims raised by the respondent in the federal suit, which were governed by Missouri law and were not previously foreclosed by it, could not be adjudicated in the garnishment proceeding after the respondent had been joined as a party.

inherent in our appellate jurisdiction. It is not our function to find our way through a maze of local statutes and decisions on so technical and specialized a subject as the scope of a garnishment proceeding in a particular jurisdiction. For one thing, it is too easy to lose our way. For example, there are numerous decisions of the Supreme Court of Missouri which declare a general principle that the garnishee can assert any defenses in a garnishment proceeding that would be open in a suit brought against him by the judgment debtor. E. g., *Weil* v. *Tyler*, 38 Mo. 545, 547; *McDermott* v. *Donegan*, 44 Mo. 85, 89; *Sheedy* v. *Second National Bank*, 62 Mo. 17, 24. We do not cite these decisions to show that the respondent's claims in this case could adequately be tested in the garnishment proceeding pending in the Missouri state court. For the crux of our ruling is that we should not be called upon to make such a determination in the first instance. But these utterances of the Missouri Supreme Court do serve as a warning that scattered opinions of an intermediate appellate court of a state may convey only doubts and confusion to one inexpert in the law of that state and yet be entirely clear and consistent when placed in the mosaic of the whole law of that state. Compare Mr. Justice Brandeis dissenting in *Railroad Commission* v. *Los Angeles R. Corp.*, 280 U. S. 145, 164. We are not concerned here with the burden of proof in establishing facts as to which only the parties to a private litigation are interested. We are concerned rather with the duty of the federal courts to determine legal issues governing the proper exercise of their jurisdiction.

The cause should be remanded to the District Court in order that it may properly exercise its discretion in passing upon the petitioner's motion to dismiss this suit.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 772.—October Term, 1941.

Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, Deceased, Petitioner, *vs.* The Excess Insurance Company of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[June 1, 1942.]

Mr. Justice Douglas concurring.

If we had here only the question as to whether the issues framed by respondent in this suit could be litigated in the statutory garnishment proceeding in Missouri, I would agree with the views expressed by the Chief Justice. But there is the further, and for me the controlling, question whether, as stated by the majority, the claims raised by respondent had been "previously foreclosed" under Missouri law. It is a fair inference from this record that respondent, like Central, received notice and had an opportunity to defend the suit brought against Cooper-Jarrett, although all of the attendant circumstances do not clearly appear. Under Missouri law the general rule seems to be that notice and opportunity to defend binds the reinsurer on judgments against the reassured. See e. g. *Strong* v. *Phoenix Ins. Co.*, 62 Mo. 289; *Gantt* v. *American Central Ins. Co.*, 68 Mo. 503; *City of St. Joseph* v. *Union Ry. Co.*, 116 Mo. 636, 643; *Finkle* v. *Western Auto. Ins. Co.*, 224 Mo. App. 285, 300. By statute (6 Mo. Stat. Ann. §§ 5898, 5899) the liability of the insurance company becomes absolute when loss occurs; and judgment against the insured establishes privity between the injured party and the insurer. See *Schott* v. *Auto Ins. Underwriters*, 326 Mo. 92; *Lajoie* v. *Central West Casualty Co.*, 228 Mo. App. 701; *Taverno* v. *American Auto Ins. Co.*, 232 Mo. App. 820. The problem is whether by reason of the insurer's liability under the policy and the statute, and respondent's liability under its reinsurance contract (See. e. g. *Holman* v. *Employers Reinsurance Corp.*, 345 Mo. 650), notice and opportunity to defend the earlier

suit were sufficient (*Schott* v. *Auto Ins. Underwriters, supra*) to bind respondent as reinsurer. Respondent's charges of fraud center on the adequacy of the notice which it received and the failure of the insured and the insurer to defend. That seems to be but one phase of the question whether under Missouri law respondent was bound by the judgment in the earlier suit.

The exercise of jurisdiction under the Federal Declaratory Judgments Act is certainly not compulsory; it is discretionary. Borchard, Declaratory Judgments (2d ed.), p. 312. If it may fairly be said under Missouri law that respondent was bound by its failure or refusal to defend the earlier suit after notice, then it would clearly be an abuse of discretion for the District Court to take or at least to retain jurisdiction of the cause in case it appeared after a hearing on that issue that respondent was so bound.

SUPREME COURT OF THE UNITED STATES.

No. 772.—October Term, 1941.

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vs.
The Excess Insurance Company of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[June 1, 1942.]

Mr. Chief Justice Stone, dissenting.

I think the decision of the circuit court of appeals was right and should be affirmed.

Respondent, reinsurer of an automobile public liability insurance policy, has been made a party to a garnishment proceeding instituted under the Missouri statues by petitioner, who has secured a Missouri default judgment upon a liability of the insured said to be covered by the policy. By this suit brought in the federal district court for Kansas, respondent now seeks among other things to set aside the judgment, so far as it establishes liability against the insurer, as fraudulently obtained.

Respondent's bill of complaint states a cause of action which it is entitled to have adjudicated in some court. The considerations suggested by Mr. Justice Douglas are of course relevant to the merits of respondent's case, and should be tried with other issues wherever and whenever they are to be tried. As the district court below had jurisdiction—and as no other reason is advanced for declining jurisdiction—it was plainly its duty to hear and decide all the issues necessary for disposition of the case unless it was made to appear with reasonable certainty that the issues could be adjudicated in the Missouri courts. Petitioner assumed that burden by his motion in the district court for an order dismissing the suit and remitting respondent to the state courts. The data, including statements of the facts spread upon the record, which he submitted in support of the motion have now received the consideration of three courts. None of them has said, and in

the circumstances of this case no federal court could say, either with binding authority or with reasonable certainty, that respondent can litigate in the Missouri courts its asserted right to set aside petitioner's judgment for fraud. Petitioner, who is not a citizen or resident of Missouri and not subject to the jurisdiction of its courts unless he voluntarily appears in an action there, has not said, and in this Court has carefully avoided saying, that he would appear in any independent suit brought in the Missouri courts to attack the judgment.

Further, it affirmatively appears that the question whether respondent can litigate its present cause of action in the statutory garnishment proceeding in Missouri is at best not free from doubt. The Missouri garnishment statutes do not deal expressly with the nature of the issues that can be raised in a garnishment proceeding. Missouri Revised Statutes, 1939, §§ 1560-1589. But the Missouri intermediate appellate courts seem to agree that in such a proceeding the garnishee cannot challenge the validity and effectiveness of the judgment save for want of jurisdiction of the court which rendered it. *Potter* v. *Whitten*, 161 Mo. App. 118, 131-32; *Nevatt* v. *Springfield Normal School*, 79 Mo. App. 198, 201; *Reid, Murdock & Co.* v. *Mercurio*, 91 Mo. App. 673, 678. The Missouri Supreme Court has never disapproved these decisions.

The court of appeals below in deciding that the cause should be litigated in the present suit declared, 121 F. 2d at 778:

"A federal court may not refuse to assume jurisdiction merely on the ground that another remedy is available or because another suit is pending, if the controversy between the parties will not necessarily be determined therein. Maryland Casualty Co. *v.* Consumers Finance Service, Inc., 101 F. 2d. 514."

Here it is evident, despite the diligence of counsel, that the ability of respondent to assert its cause of action in the Missouri garnishment proceeding is uncertain and must remain so until the Supreme Court of Missouri has spoken. Just how respondent's ability to maintain its suit in Missouri can be made more certain or even reasonably probable, or how the cause of justice will be advanced by compelling respondent to begin over again the nearly three years' course of litigation which it has now traveled, is not revealed. The concededly erroneous decision of the district court has been reversed by the circuit court of appeals. Unless this Court is now prepared to say that respondent's ability to maintain the

suit in the state court is free from doubt, we should leave the judgment undisturbed and not deny to respondent the benefit of the federal jurisdiction which Congress has sanctioned. One of the chief purposes of creating the diversity of citizenship jurisdiction was to afford to suitors an unclouded opportunity to assert their rights in the federal courts when the exigencies of state court jurisdiction of subject matter or parties, or both together as in this case, render doubtful their ability to proceed in the state courts. In such a case a suitor ought not to be penalized, as respondent plainly is, for invoking the federal jurisdiction.

The Missouri law, if not conclusively against the assertion of the present cause in the Missouri garnishment proceeding, is at least so doubtful that respondent ought not to be compelled to seek the futile prophecy of the district court in Kansas as to how the Missouri courts will resolve an unsettled point of Missouri practice. Since petitioner has failed to sustain his burden of showing that the case is a proper one for dismissal, the district court should exercise its jurisdiction by proceeding to determine the merits without further delay. If this litigation is ever to end, it is important for it to get started.

Mr. Justice ROBERTS and MR. Justice JACKSON join in this dissent.